Supreme Court, U.S.

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No. ____ OFFICE OF THE CLERK

In the

Supreme Court of the United States

October Term, 1997

Charles D. Ulrich, C.P.A.,

Petitioner,

vs.

St. Paul Ramsey Hospital, Hennepin County Medical Center, St. Luke's Hospital, St. Joseph's Medical Center, and University of Minnesota Hospital and Clinics,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. In considering a civil complaint brought within federal diversity jurisdiction, met by motion to dismiss filed under Rule 12(b)(6) of the Federal Rules of Civil Procedure, may a federal circuit court of appeals find such complaint insufficient on any basis other than that it "appears beyond doubt that the plaintiff can prove no facts in support of his claim which would entitle him to relief," as held in *Conley v. Gibson*, 355 U.S. 41 at 45-46 (1957)?

2. Where a suit at common law in quasi-contract for money restitution to prevent unjust enrichment is brought within federal diversity jurisdiction, and the complaint is met by motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, may a federal circuit court of appeals FIND THE FACTS TO BE OTHER THAN THOSE ALLEGED IN THE COMPLAINT, and on such basis find the complaint insufficient, yet so act in keeping with Amendment VII of the United States Constitution construed as prescribed in *Liberty Oil Co. v. Condon Nat'l. Bank*, 260 U.S. 235 at 243 (1922)?

3. Where a suit at common law in quasi-contract for money restitution to prevent unjust enrichment is brought within federal diversity jurisdiction, and the complaint is met by motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, must the sufficiency of the complaint be determined according to the common law of the State in which the federal district court sits and the operative facts took place, as held in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938)?

4. Where a suit at common law in quasi-contract for money restitution to prevent unjust enrichment is brought within federal diversity jurisdiction, and a motion to dismiss is made on a specific defense which is argued by the defendants, approved by the federal district court, but rejected on appeal,

is the federal circuit court of appeals then obliged, under *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938), to apply the rule of common law given by the supreme court of the State IN LIGHT OF THE LEGAL HISTORY ACKNOWLEDGED BY SUCH SUPREME COURT AS THE BASIS FOR SUCH RULE?

5. Under the common law of Minnesota, as it may be determined from decisions of the supreme court of the State and the legal history mentioned in such decisions, and also as maintained by other good authority including *Winton v. Amos*, 255 U.S. 373 (1921), where a professional man renders services which, though not requested, and not rendered pursuant to express contract, have produced a benefit not otherwise available, and where such benefit could have been refused but was accepted and enjoyed, is such professional man then entitled to fair compensation for such services on a theory of quasi-contract or contract implied-in-law?

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Comes now your petitioner, and he shows this court the following particulars, to wit:

JURISDICTION

Your petitioner seeks reversal of the judgment of the United States Court of Appeals for the Eighth Circuit on May 30, 1997, reproduced in Appendix B.

An order denying a timely suggestion for rehearing was entered on July 8, 1997, reproduced in Appendix A.

Jurisdiction to review this cause on writ of certiorari is premised on section 1254 of 28 United States Code, insofar as it permits this court to review the judgment of a federal court of appeals on writ of certiorari, as well as Rule 13 of the Rules of the United States Supreme Court, which, as applied to the circumstances of this cause, allows the filing of a petition within 90 days from July 8, 1997.

CONSTITUTIONAL PROVISIONS

This case turns on Article IV, Section 1 of the United States Constitution insofar as *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938) arguably depends on it, as suggested by John Marshall in the Virginia Convention of 1788 where he explained to the delegates the law applicable to suits in a federal court between citizens of different States. Specifically, Article IV, Section 1 may arise insofar as it provides, "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings in every other State."

This case indirectly turns on Amendment V to the United States Constitution, insofar as it amplifies the commands of Amendment VII, and insofar as it says that no person shall "be deprived of life, liberty, or property, without due process of law." And, for reasons explained hereinafter, this case turns on Amendment VII insofar as it provides, "In suits at common

law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

STATEMENT OF THE CASE

This case arose within the uncontested diversity-of-citizenship jurisdiction of the federal district court of Minnesota, as defined by Section 1332 of 28 United States Code.

The uncontested operative facts occurred within the State of Minnesota, as appears in the summons and complaint reproduced as Appendix F.

The complaint, joining the five respondents here named as defendants, alleges the following facts in some detail:

-- That your petitioner as plaintiff, a certified public accountant with highly specialized expertise in health care matters, represented certain hospitals in a difficult and tedious Medicare and Medicaid reimbursement problem;

-- That, due to his efforts, he prevailed for his clients in the case of *Ada Hospital et al. v. Natalie Haas Steffen*, Civ. No. 4-93-972 on the docket of the United States District Court of Minnesota, and was compensated by them pursuant to his express contract with them;

-- That, SOLEY BECAUSE of your petitioner's work and success in the said case, AND FOR NO OTHER REASON, the State of Minnesota offered the five hospitals here named as respondents the sum of $2,054,068 in Medicare and Medicaid reimbursements which in fact they OTHERWISE WOULD NOT HAVE BEEN offered at all;

-- That your petitioner did not act with gratuitous intent, but as a professional man IN THE EXPECTATION OF BEING FAIRLY COMPENSATED to whatever extent his

work secured benefits for hospitals other than those whom he then formally represented by express contract;

-- That these five respondents WERE NOT OBLIGED TO ACCEPT the reimbursements offered, BUT DID SO FREELY and enjoyed the large sums paid them; and

-- That your petitioner DID NOT ACT AS A VOLUNTEER OR AN INTERMEDDLER.

Your petitioner then prayed for a money judgment for fair and reasonable compensation to prevent unjust enrichment according to principles of quasi-contract or contract implied in-law under the common law of Minnesota.

The respondents filed a motion to dismiss under Rule 12(b)(6) of the Minnesota Rules of Civil Procedure, reproduced in Appendix E. Laying aside defenses based on twisting facts which were admitted by the motion, it was argued in behalf of these defendants, as set forth in their formal argument in the federal district court, that your petitioner did not allege or offer to prove any "illegal or unlawful" conduct by the respondents, and that such conduct is an essential allegation in a claim of unjust enrichment under the common law of Minnesota.

On September 18, 1996, the federal district court entered a formal order dismissing the complaint, reproduced as Appendix D.

The federal district court did so after holding from the bench on September 13, 1996, as reflected in Appendix C, that your petitioner was not entitled to recover under the common law of Minnesota, since he failed to allege, as supposedly required in that the respondents "benefited or acted illegally," etc.

The federal court of appeals for the 8th circuit affirmed, as reflected in their unpublished opinion of May 8, 1997, reproduced as Appendix B.

In this opinion, the federal circuit court of appeals mischaracterized the allegations of the complaint as describing

only efforts of your petitioner which "incidentally conferred a benefit," whereas the complaint clearly alleges a direct "but for" causal relationship. The federal circuit court of appeals also stated that your petitioner sought a "contingency fee," as if he had sued on an express contract, whereas the suit rests on a theory of quasi-contract, and seeks quantum meruit.

The problem of mischaracterizing the record aside, the federal circuit court of appeals indicated that your petitioner might recover under the common law of Minnesota either upon showing "illegal or unlawful" conduct in obtaining the benefit, or "morally wrong" keeping of the benefit without paying fair and reasonable compensation.

In this way, the federal circuit court of appeals righted the error of the federal district court and counsel for the respondents who had insisted that a claim of unjust enrichment lies only upon a showing of "illegal or unlawful" conduct.

Yet, the federal circuit court of appeals affirmed the federal district court, as if your petitioner had not alleged that it would be "morally wrong" in the sense contemplated by the common law of Minnesota for the respondents to keep their benefit without paying fair and reasonable compensation, although he had alleged in his complaint, and the motion to dismiss conceded, that he had rendered valuable services, producing great benefits which would not otherwise have been available, could have been refused, but were accepted and enjoyed by the respondents without paying him any compensation.

The federal circuit court of appeals denied a timely suggestion for rehearing by order of July 8, 1997, reproduced as Appendix A.

Your petitioner seeks review by writ of certiorari.

REASONS WHY THE WRIT SHOULD BE GRANTED

1. The attempt by the federal circuit court of appeals to mischaracterize the facts alleged in the complaint and admitted by the motion to dismiss in this case illustrates a recurring problem in modern pleading and practice, and it is becoming so frequent that this court should intervene in this case, and use it to teach the legal profession once again what lawyers and judges have forgotten, ignored, or disregarded to the detriment and prejudice of many litigants in our day.

Here, to the detriment and prejudice of your petitioner, the federal circuit court of appeals effectively rewrote the uncontested facts of the complaint, which alleged a proximate causal relationship between your petitioner's work and the benefit made available from such work, and sought quantum meruit premised on a contract implied-in-law. The federal circuit court of appeals misrepresented the complaint as alleging only an "incidental benefit" as if no direct "but for" causal relationship had been set forth in your petitioner's pleading and admitted by the respondents' motion to dismiss. The federal circuit court of appeals stated that your petitioner sought a "contingency fee" as if he had sued on an express contract, when, in fact, he never mentioned such a contract.

This type of judicial arrogation of fact-finding powers, even contrary to facts procedurally admitted, has become malpractice of run-away frequency in our era.

In a classical suit at common law brought upon original writ and declaration, ultimate facts had to be pleaded, free of any mention of evidence or any conclusion of law, and free of certain technical defects of form (e.g., ambiguity, including negative or affirmative pregnant, prolixity, surplusage, argumentation, repugnancy, and duplicity). Deficiencies of form could be addressed by special demurrer. But where ultimate facts were correctly pleaded, a general demurrer could be interposed, and such a demurrer admitted everything

previously alleged. In this way, facts were settled on the record, and judgment in the first instance or on writ of error was entered accordingly.

Under classical rules prevailing when the 7th Amendment was adopted in 1791, facts could not be found against allegations pleaded in a suit at common law unless allegations pleaded were traversed or denied by plea in bar, replication, or subsequent plea, so as to produce issues of fact which (absent an express waiver by both sides of the case) had to be determined by verdict of a jury upon a public trial in light of the evidence heard.

In the absence of a contrary agreement by the parties, trial of facts in a suit at common law was always by jury, NOR COULD FACTS EVER BE JUDICIALLY FOUND TO BE OTHER THAN AS PLEADED, either in the first instance or on writ of error. This regime of pleading and practice at common law is amply explained in detail by Koffler and Reppy, *Handbook on Common Law Pleading*, West Publishing Co., 1969, pp. 82-101, 130-151, 384-552, and 599-603. Trial by jury and associated rules of common law, according to Elbridge Gerry during the Philadelphia Convention, were meant "to guard against corrupt judges." See, e.g., Elliot's *Debates on the Federal Convention*, Lippencott & Co., 2nd Ed. 1859, Vol. 5, p. 538 (Madison's Notes, September 12, 1787).

Hence, in asking this court to intervene and correct the kind of judicial malpractice here complained of, your petitioner seeks to strengthen principles which were designed to assure the integrity of civil litigation across the United States.

Modern procedure has removed many technicalities of pleading at common law. Today, we have a much more relaxed style of pleading, and review is by appeal, yet even so, save where the parties expressly agree on the record, trial of facts in a suit at common law must always be by jury, nor may the facts ever be found by the court in the first instance or on

review other than as pleaded or fairly asserted on motion, as appears, e.g., in James and Hazard, *Civil Procedure*, Little Brown & Co., 2nd Ed. 1977, pp. 55-150, 227-348, 677-680.

The foregoing principles under classical and modern procedure are preserved and perpetuated by the 7th Amendment, which pointedly demands trial by jury in all suits at common law in all federal courts, and review of facts by higher tribunals always according to the rules of the common law. The necessary inference or inescapable corollary (subject to the same exception regarding express waiver by the parties on both sides) is that THE 7TH AMENDMENT, REINFORCED BY THE DUE PROCESS CLAUSE OF THE 5TH AMENDMENT, PROHIBITS JUDICIAL FINDINGS CONTRARY TO FACTS PLEADED OR FAIRLY ASSERTED ON MOTION IN ALL SUITS AT COMMON LAW.

Accordingly, in *Liberty Oil Co. v. Condon National Bank*, 260 U.S. 235 at 243 (1922), this court held that the determination of whether a suit is brought at common law or in equity, and, consequently, whether trial by jury is a constitutional right, and how certain other questions should be handled, must be grounded as closely as possible on "the practice in the courts of law and chancery in England when the [United States] Constitution and the 7th Amendment were adopted, and it is in the light of such practice that the 7th Amendment is to be construed." There a suit in quasi-contract for money restitution, which is precisely the nature of the suit here, was characterized as a suit at common law; trial by jury would have been required in such initial suit, yet the case was transformed into proceedings in equity when the defendant, as stakeholder of the funds in question, filed an interpleader to resolve ownership of the money.

See also *Dimick v. Schiedt*, 293 U.S. 474 (1935), which limited the use of additur in light of the right of trial by jury under the 7th Amendment; also *Curtis V. Loether*, 415 U.S.

189 (1974), where a suit to redress injury to civil rights by money damages was held to be triable by jury because analogous to trespass on the case; and again *Pernell v. Southall Realty*, 416 U.S. 363 (1974), where an action of unlawful detainer was held to be triable by jury because analogous to ejectment.

In *Baylis v. Travelers Ins. Co.*, 113 U.S. 316 (1885), this court held that, in a suit at common law on an express contract, corresponding to special assumpsit, the facts were triable by jury, and that, given even a very slight possibility of different interpretation in the evidence at trial, only a jury could find the facts. "Without a waiver of the right of trial by jury," it was said in 113 U.S. at 320-321, "the court errs if it substitutes itself for the jury."

Your petitioner maintains that the 7th Amendment, reinforced by the Due Process Clause of the 5th Amendment, has not less been affronted where, as here, a federal circuit court of appeals has substituted its own assessment of the facts, contrary to the allegations (in a declaration admitted by demurrer or) in a complaint admitted by motion to dismiss.

Your petitioner asks this court to address this issue, and explain to the country that MODERN PROCEDURE WAS INTENDED TO PROMOTE EFFICIENT LITIGATION, BUT NOT TO AUTHORIZE JUDICIAL FINDINGS NOT CONTEMPLATED BY THE 5TH AND 7TH AMENDMENTS, AND NOT TO ENCOURAGE FEDERAL JUDGES TO DISREGARD FACTS SETTLED BY PLEADINGS IN SUITS AT COMMON LAW.

This suit, based on quasi-contract, is brought at common law, but, whether brought at common law or in equity, the rule governing a determination of sufficiency in a complaint on motion to dismiss was unambiguously set forth by this court in *Conley v. Gibson*, 355 U.S. 41 at 45-46 (1957). The rule in this context is even more liberal in favor of a plaintiff: dismissal is allowable only if, in light of the allegations in the

complaint, no conceivable evidence could support a claim for relief.

This case, if accepted for review, would offer a good opportunity to restate with renewed emphasis long overdue that, on motion to dismiss for failure to state a claim, especially where suit is brought at common law, a complaint must be construed in a light most favorable to the plaintiff.

2. The other problem in this case is correct application of *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). Your petitioner agrees at the outset that the opinion of Louis Brandeis was eminently correct, and is reinforced by the history of constitutional formation. See, e.g., the remarks of John Marshall on June 20, 1788, during the Virginia Convention, as appears in Elliot's *Debates*, Vol. 3, pp. 356-357. Your petitioner is prepared to argue that the doctrine of *Erie Railroad*, 304 U.S., has a constitutional basis in the Full Faith and Credit Clause.

When this case came before the federal district court in Minneapolis, the most recent decision of the supreme court of the State on the law of unjust enrichment was, and remains *Servicemaster v. GAB Business Services*, 544 N. W. 2d 302 (Minn. 1996).

In *Servicemaster*, 544 N. W. 2d at 306, the court restated the basic law of unjust enrichment as it prevails in Minnesota, citing two main cases, to wit:

-- In *First National Bank v. Ramier*, 311 N. W. 2d 502 (Minn. 1981), a general rule was acknowledged in the dissent that a claim of unjust enrichment lies if it would be "morally wrong" to keep or enjoy property or a benefit without restitution. Yet the majority held that, where a bank has freely accepted a promissory note on a loan without security, an equitable lien will not be impressed in behalf of the bank, -- not unless it is shown that the bank was influenced by fraud, duress, or other "unlawful or illegal" behavior.

That case plainly dealt with an exceptional problem, not here raised, where specific or other proper restitution requires avoidance of an arms-length transaction. The courts of Minnesota will generally deny an equitable lien or other such extraordinary remedy to work restitution by annulling the effect of a particular act or setting aside a particular transaction, unless some "unlawful or illegal" act or deception is pleaded and proved to justify such intervention as where fraud might have induced an unsecured loan, or duress might justify rescission of a unfair contract. In this respect, the law of Minnesota does not appear to be much different from the law of many if not most other States. See, e.g., McClintock's *Principles of Equity*, West Pub. Co., 2nd Ed. 1948, pp. 214-255 and 319-335.

The federal circuit court of appeals in this case cited *Ramier*, 311 N. W. 2d, but made clear that it does not set forth the only allowable basis of recovery in a suit brought to redress unjust enrichment, as the federal district court had held, and as counsel for the respondents had strenuously argued. For the federal circuit court of appeals also acknowledged it is generally enough to show that failure to make restitution would, in the circumstances, be "morally wrong."

-- The other case cited in *Servicemaster*, 544 N. W. 2d at 306, is highly regarded authority on the general rule on unjust enrichment in Minnesota: in *Klass v. Twin City Federal*, 190 N. W. 2d 493 (Minn. 1971), a suit at common law in quasi-contract for money restitution was allowed in the absence of any showing of fraud, duress, or other "unlawful or illegal" conduct. In 190 N. W. 2d at 494-495, it was said that a suit in quasi-contract to prevent unjust enrichment lies whenever or to whatever extent it would be "morally wrong" to allow the defendant to keep what he has gained. Again, at the same place, the court specifically went on to say that a showing of fraud, duress, and the like is necessary only where the remedy

sought necessitates rescission or circumvention of a bad bargain.

And in *Klass*, 190 N. W. 2d at 494-495, the court cited the historical basis of the general rule in Minnesota, referring to the language of a famous judge in the legal history of the State, fondly called "Billy" Mitchell, in *Brand v. Williams*, 13 N. W. 42 (Minn. 1882), and also *Heyward v. Northern Assurance Co.*, 158 N. W. 632 (Minn. 1916), which in turn quoted and rested upon, not only Mitchell's phrase, but the formulation of Lord Mansfield in *Longchamp v. Kenny*, 79 Eng. Rep. 91 (K. B. 1779):

> "Great benefit arises from a liberal extension of the action of money had and received, because the charge and defense in this kind of action are both governed by the equity and conscience of the case."

3. It is undeniable that the common law of Minnesota, as declared by the supreme court of the State, rests upon long-established principles which existed at the time of Lord Mansfield, including the common counts used to plead general assumpsit, all conveniently described in Koffler & Reppy's *Common Law Pleading*, pp. 344-360.

In Minnesota, it is still so, for the supreme court of the State has made it inescapably clear that, as Oliver Wendell Holmes once said, "the abolition of the common-law forms of action has not changed the rules of substantive law." -- The *Common Law*, Little, Brown & Co., Reprt. 1969, p. 67.

Given the circumstances of this case, your petitioner could have recovered under any one of three common counts, --the count for money had and received, mentioned by Lord Mansfield, but also the count for work, labor, and services, and the count of quantum meruit, as is made plain enough by Koffler and Reppy on pages 351 and 359 of their treatise.

Whenever work has been done, though not requested, and not under express agreement, and such work has in fact produced a benefit which otherwise would not have been available and which could have been refused, yet such benefit was freely accepted and enjoyed, the common law under and after the common counts will imply an obligation to pay the fair value of the work. See, e.g., Dan Dobbs, *Handbook on the Law of Remedies*, West Publishing Co. 1973, pp. 298-305.

It was so at the time of Lord Mansfield, and the view then prevailing, liberated of the strictures of ancient formality, was adopted eighty-one years ago by the supreme court of Minnesota in *Heyward*, 158 N. W., then reaffirmed twenty-six years ago in *Klass*, 190 N. W. 2d, which was cited with approval only a year ago in *Servicemaster*, 544 N. W. 2d.

It is "morally wrong" in the sense meant by Billy Mitchell in *Brand v. Williams*, 13 N. W., notwithstanding the want of an actual undertaking, for someone to enjoy a benefit from the services of a professional man, where the benefit could have been refused, and yet not pay fair compensation for such services. Most services rendered in commerce through the United States today, including most fees from the practice of law, are compensable only if this principle, established hundreds of years ago, is respected.

The same principle was applied in favor of a professional wrestler in *Ventura v. Titan Sports*, 65 F. 3d 725 (8 Cir. 1995). In that case, during what the court called the "pre-Bloom" period, the wrestler made certain public commentaries which benefited a promotions company. These benefits could have been refused, but were freely enjoyed. In the "pre-Bloom" period, the wrestler was not induced to act by fraud, duress, or like wrong, yet he was allowed to recover fair compensation in quasi-contract. Your petitioner asks why he, as a certified public accountant, is not also entitled to the benefit of the same principle.

The idea of paying a professional man for his services on the basis of implied duty is so universal that this court approved of the same notion in impressing an equitable lien against a fund payable to certain beneficiaries in behalf of the lawyers whose work produced the fund, as appears in *Winton v. Amos*, 255 U.S. 373 (1921).

How is it that the federal circuit court of appeals should fail even to acknowledge this landmark decision of the highest court of the land, directly on point, and vigorously cited and pressed in argument, as if it had never been reported?

How is it that the highest court of the land should allow lawyers to be paid for their work, yet the federal circuit court of appeals in this case, after earlier allowing a wrestler to be paid, should deny compensation to a certified public accountant whose work, as conceded on the face of the pleadings, enabled hospitals to be reimbursed to the extent of millions of dollars?

How is it that even federal judges nowadays think that legal history is an idle flight of fancy? Is not this attitude a major cause of decline in judicial standards? And is it not the duty of this court to demand an end to deterioration of service by the federal bench?

4. The case of your petitioner should be reviewed by this court on writ of certiorari, because it will give this court an opportunity to illustrate how the doctrine of *Erie Railroad*, 302 U.S., should be properly and correctly applied. It is a pedagogical responsibility which this court should not neglect.

A FEDERAL COURT CANNOT APPLY THE COMMON LAW OF A STATE IN A SUIT BETWEEN CITIZENS OF DIFFERENT STATES, MERELY BY PAYING ATTENTION TO SUPERFICIAL WORDS, WITHOUT NOTING THE ROOT PRINCIPLES TO WHICH THE WORDS REFER. A federal court must look to state precedents, and, in order to discern their significance, must look to their historical or other basis in jurisprudence. A

more thoughtful and searching approach is required in applying the doctrine of *Erie Railroad*, 302 U.S., as illustrated by such opinions as McGruder, J., in *Mason v. American Emery Wheel Works*, 241 F. 2d 906 (1 Cir. 1957), which was later approved in *State Stove Mfg. Co. v. Hodges*, 189 So. 2d 113 (Miss. 1966). See also Stone, J., in *West v. American Telph. & Telegr. Co.*, 311 U.S. 223 at 236-237 (1940); Wyzanski, J., in *Pomerantz v. Clark*, 101 F. Supp. 341 at 345-346 (D. Mass 1951); and Friendly, J., in *Nolan v. Transocean Air Lines*, 276 F. 2d 280 at 281 (2 Cir 1960).

Your petitioner has been denied justice because of thoughtless disregard of professional standards in applying the doctrine of *Erie Railroad*, 302 U.S. It is asking too much of federal judges in lesser courts that they should display the kind of erudition by which their predecessors often graced the bench? Are we doomed to jurisprudence guided by computer programs, unloved by human intelligence?

CONCLUSION

Your petitioner urges that a writ of certiorari should issue here in order to review a conjuncture of questions touching upon the *Erie* doctrine and the 7th Amendment. Your petitioner seeks to have both elements viewed, expounded, and harmonized in light of pertinent legal history. Appropriate treatment of these questions by this court could lead to an important sequel to the celebrated case of *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958), which qualified the *Erie* doctrine with the 7th Amendment.

Dated September 15, 1997

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-3651MNMI

Charles D. Ulrich,	*	
	*	
Appellant,	*	
	*	Order Denying Petition for
vs.	*	Rehearing and Suggestion
	*	for Rehearing En Banc
St. Paul Ramsey Hospital;	*	
et al.,	*	
	*	
Appellees.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

July 8, 1997

Order Entered at the Direction of the Court:

/s/Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 96-3651

Charles D. Ulrich,	*	
	*	
Appellant,	*	
	*	
v.	*	
	*	Appeal from the United
St. Paul Ramsey Hospital;	*	States District Court for the
Hennepin County Medical	*	District of Minnesota.
Center; St. Luke's Hospital;	*	[UNPUBLISHED]
St. Joseph's Medical Center;	*	
University of Minnesota	*	
Hospital and Clinic,	*	
	*	
Appellees.	*	

Submitted: May 21, 1997
Filed: May 30, 1997

Before BOWMAN, WOLLMAN, and BEAM, Circuit Judges.

PER CURIAM.

Charles D. Ulrich appeals the district court's[1] dismissal of his diversity action for failure to state a claim. We affirm.

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[1] The Honorable James M. Rosenbaum, United States District Judge for the District of Minnesota.

Ulrich, a certified public accountant, filed this action against five Minnesota hospitals, alleging that they received windfall payments as a result of work he did in seeking proper reimbursement for unpaid Medicare deductibles and coinsurance obligations. In 1988, Ulrich discovered that Minnesota hospitals were not being properly reimbursed for patients eligible for benefits under both Medicare and Medicaid insurance programs. He contacted all hospitals that had participated in the Minnesota Medical Assistance program and offered to pursue reimbursement on their behalf for a contingency fee. More than fifty hospitals agreed to the arrangement, but defendants declined.

Ulrich pursued the claims for his clients, eventually settling with the state and receiving his contingency fee. Before Ulrich could again approach the remaining hospitals about their possibility for recovery, the state--to resolve potential outstanding claims--offered to pay defendants a portion of what they were owed, using the formula that had been used in the settlement Ulrich engineered. Ulrich claimed that because defendants did not pay him a contingency fee, they were unjustly enriched by his efforts. The district court dismissed the action for failure to state a claim.

We review de novo the district court's interpretation of Minnesota law, see *Kovarik v. American Family Ins. Group*, 108 F.3d 962, 964 (8th Cir. 1997) (citing *Salve Regina College v. Russell*, 499 U.S. 225, 231 (1991)), and are bound by the decisions of the Minnesota courts, see *Kovarik*, 108 F.3d at 964. We also review de novo a dismissal for failure to state a claim. See *Alexander v. Peffer*, 993 F.2d 1348, 1349 (8th Cir. 1993).

We agree with the district court that Ulrich's claim fails, as he has made no allegation that defendants' acceptance of payments to which they were entitled was fraudulent or illegal in any way, and he has stated no facts to support an allegation that defendants' actions were morally wrong. See *First Nat'l*

Bank v. Ramier, 311 N.W.2d 502, 504 (Minn. 1981) (no claim for unjust enrichment absent illegal or unlawful conduct by defendant); see also *Servicemaster of St. Cloud v. GAB Business Servs., Inc.*, 544 N.W.2d 302, 306 (Minn. 1996) (unjust-enrichment claim failed because defendant did not receive security interest in home "under any cloud of impropriety"); *Ventura v. Titan Sports, Inc.*, 65 F.3d 725, 729 (8th Cir. 1995) (characterizing Minnesota unjust-enrichment law as "well settled"; plaintiff won unjust-enrichment claim where defrauded by defendant), *cert. denied*, 116 S. Ct. 1268 (1996); *Spiess v. Schumm*, 448 N.W.2d 106, 108 (Minn. Ct. App. 1989) (constructive trust imposed where it would be morally wrong for property holder to retain funds).

Ulrich is not entitled to compensation from defendants merely because his efforts in representing his clients may have incidentally conferred a benefit upon defendants. See *Galante v. Oz, Inc.*, 379 N.W.2d 723, 726 (Minn. Ct. App. 1986).

The judgment is affirmed. Appellees' motion for attorney's fees and costs is denied.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

Civil No. 4-95-247

Charles Ulrich,
Plaintiff,

-v-

Order from Bench
September 13, 1996

St. Paul Ramsey Hospital, et al.,
Defendants.

PARTIAL TRANSCRIPT OF PROCEEDINGS
HAD BEFORE THE HONORABLE JAMES M.
ROSENBAUM, and a Jury
Minneapolis, Minnesota

APPEARANCES:

For the Plaintiff	Thomas Shroyer Cory Larsen Bettenga
For the Defendant	John French Thomas Schroeder Jay Christiansen

Reported By: Dawn M. Sampson RPR-CM

THE COURT: Thank you, counsel. The matter comes before the Court on the defendant's motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. That motion is granted.

The plaintiff, Charles Ulrich, appears to be, according to the pleadings, a South Dakota citizen, and the present defendant, St. Paul Ramsey Hospital, Hennepin County Medical Center, St. Luke's Hospital, St. Joseph's Medical Center, and the University of Minnesota Hospital and Clinics, are all Minnesota hospitals.

According to those pleadings, Mr. Ulrich approached several hospitals in Minnesota, among them the defendants, in 1989, to suggest that they had not been fully or properly reimbursed for patients duly admitted for Medicare and Medicaid. Ulrich appears to be a CPA, and he offered to pursue what he perceived to be their reimbursement claim on a 50-percent contingency fee basis. Several hospitals, all of which included the defendants, or which included all the defendants, rejected Ulrich's offer. Between 1989 and October 1993, Ulrich approached state and federal agencies on those which had secured his services, seeking reimbursement for those hospitals which did accept his offer.

In October of 1993, having been unable to succeed involuntarily, speaking with the state and securing their agreement, Ulrich then apparently at his own cost hired an attorney to bring suit on behalf of his clients. I reference here the complaint at paragraph 17. Now, in April of 1994, Ulrich's clients dismissed their suit after receiving a $4.2 million agreed settlement. Thereafter, Ulrich again solicited those same hospitals that had previously rejected his proffered services. Those hospitals included the present defendants. They again rejected his offer.

In June of 1995, approximately a year after the more recent approach, the state voluntarily offered to reimburse all other hospitals which were otherwise eligible who had not

been parties to the 1993 suit, and the defendants accepted the state's offer and the corresponding payment.

In February of this year, Mr. Ulrich brought suit before this Court seeking damages based on a theory of *quantum meruit*, and he alleges that the state reimbursed the defendant solely as a result of his efforts in bringing that action previously in 1993. As such, it is his theory that the defendants were unjustly enriched when they accepted the state's offer and refused to decline payment of the state's proffered fund and thereafter to pay Mr. Ulrich the 50 percent contingency which they had previously twice rejected. The defendants now argue that his claim must fail, contending that he has not pleaded and cannot establish the required elements for his claim of unjust enrichment.

And under Minnesota law, in this Court's view, a quasi contract claim is available if the plaintiff can show that the defendant was unjustly enriched. I cite here *First National Bank v. Ramier* at 311 N.W.2d 502 at 504, Minnesota, 1981. To establish this claim for unjust enrichment, a plaintiff bears a burden. He must show that the defendant received something, quote, for which the defendant in equity and good conscience should not pay, close quote. That's from *Servicemaster v. GAB Business Services* at 544 N.W.2d 302, 306, Minnesota, 1996, and I have not internally quoted. The plaintiff, however, must show more than that the defendant benefitted from his efforts, quote, instead, it must be shown that the party was unjustly enriched in the sense that the term unjustly could mean illegally or unlawfully, close quote, and here I quote *Ramier* at 311 N.W. at 504; and reference also *Ventura v. Titan* at 65 F.3d at 725 at 729, Eighth Circuit, 1995. Here Mr. Ulrich has not alleged, nor could he, that the defendants benefited or acted illegally in accepting the state's offer of reimbursement. As Ulrich admits, the defendants were in fact entitled to those funds. It cannot be said that the defendant

acted at all, that the defendants acted in any sense fraudulently or wrongfully.

Now, Ulrich offered his services to the defendants twice and his offers were twice refused. As such he never had any legitimate expectation that these defendants would remunerate him in any fashion. The defendants did not even use the information they learned from Ulrich to actively pursue other claims, although the Court is, ah, considers it extremely likely that the defendants could have done so without owing Ulrich any compensation. I note this, however, as not by way of a ruling. Rather, the defendants accepted an unsolicited offer of reimbursement, which came from the state of Minnesota and all parties on both sides, agree that the remunerated funds were appropriately paid, and due. The Court notes that the plaintiff, when he brought the matter at his own cost, was under no legal disability, and appears to be under no bar to having brought this matter as a class action. He did not choose to do so. And even there, whether or not it is pure conjecture, whether or not their services would have been accepted or there would have been an opt-out, but the reality was he even had that option under which he might have otherwise had a direct claim to the benefit to which he claims he is conferred. He has possessed, and does not possess that at this time. Accordingly, under all of the theories advanced, the defendants' motion to dismiss is granted. Under all of the theories, I should say, advanced by the plaintiff, the defendants' motion to dismiss is granted.

The Court notes the restitution, restatement of restitution does not appear to have been correctly addressed by the Supreme Court of Minnesota. The Court has absolute confidence that the state of Minnesota will make a decision in accord. The plaintiff's complaint is dismissed with prejudice and that'll be the order of the Court. Thank you, counsel.

MR. FRENCH: Thank you, Your Honor.

THE COURT: I'm sorry -- you're welcome, counsel, I didn't hear you.

(Recess.)

CERTIFIED BY:_____

Dawn M. Sampson

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
4-96-CV-144

Charles D. Ulrich	)	
	)	
v.	)	
	)	ORDER
St. Paul Ramsey Hospital;	)	
Hennepin County Medical	)	
Center; St. Luke's Hospital;	)	
St. Joseph's Medical Center;	)	
and University of Minnesota	)	
Hospital and Clinics	)	

Defendants move to dismiss, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Court heard oral argument on September 13, 1996.

Based on the files, records, and proceedings herein, and for the reasons set forth at the hearing, IT IS ORDERED that:

Defendants' motion is granted. This matter is dismissed with prejudice.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: September 18th, 1996

/s/
JAMES M. ROSENBAUM
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Charles D. Ulrich, Plaintiff, v. St. Paul Ramsey Hospital; Hennepin County Medical Center; St. Luke's Hospital; St. Joseph's Medical Center; and University of Minnesota Hospital and Clinic, Defendant	)	Court File No.: 4-96-144 **AMENDED NOTICE OF MOTION AND MOTION TO DISMISS**

TO: Plaintiff Charles D. Ulrich and his attorneys, Moss & Barnett, by Thomas J. Shroyer and Cory Larsen Bettenga, 4800 Norwest Center, 90 South Seventh Street, Minneapolis, Minnesota:

PLEASE TAKE NOTICE that Defendants St. Paul-Ramsey Medical Center, Hennepin County Medical Center, St. Luke's Hospital, St. Joseph's Medical Center, and University of Minnesota Hospital and Clinic, by the undersigned counsel, will move this Court for an Order dismissing Plaintiff's Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Said motion shall be heard by The Honorable James M. Rosenbaum on September 13, 1996 at 2:00 p.m., in Courtroom No. 1, Minneapolis Federal Courts Building at 110 South 4th Street, Minneapolis, Minnesota.

This Motion is based upon all of the pleadings, records and files herein, and a Memorandum of Law to be filed hereafter.

Date: July 12, 1996 FAEGRE & BENSON LLP

By /s/ Thomas Schroeder
John D. French #31914
Jay D. Christiansen #16718
Thomas S. Schroeder #223207
Attorneys at Law
2200 Norwest Center
90 South Seventh Street
Minneapolis, Minnesota 55402-3901

Attorney for Defendants

United States District Court
District of Minnesota
FOURTH DIVISION

SUMMONS IN A CIVIL ACTION

Charles D. Ulrich,

CASE NUMBER: 4-96-144

v.

St. Paul Ramsey Hospital; Hennepin County Medical Center; St. Luke's Hospital; St. Joseph's Medical Center; and University of Minnesota Hospital and Clinics,

TO: (Name and Address of Defendant)

St. Paul Ramsey Hospital
640 Jackson Street
St. Paul, MN 55101

Hennepin County Medical Center
701 Park Avenue South
Minneapolis, MN 55415

St. Luke's Hospital
915 East First Street
Duluth, MN 55805

St. Joseph's Medical Center
523 North Third Street
Brainerd, MN 56401

University of Minnesota Hospital
420 Delaware Street
Minneapolis, MN 55455

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY (name and address)
Thomas J. Shroyer

Cory Larsen Bettenga
Moss & Barnett, P.A.
4800 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402-4129

an answer to the complaint which is herewith served upon you, within twenty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

FRANCIS E. DOSAL
CLERK

February 16, 1996
DATE

/s/
BY DEPUTY CLERK

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

Charles D. Ulrich,

Plaintiff,

v.

COMPLAINT AND DEMAND FOR JURY TRIAL

St. Paul Ramsey Hospital; Hennepin County Medical Center; St. Luke's Hospital; St. Joseph's Medical Center; and University of Minnesota Hospital and Clinics,

Defendants.

Plaintiff, for his claim for relief herein, states and alleges as follows:

PARTIES AND JURISDICTION

1. Plaintiff Charles D. Ulrich, C.P.A. (hereinafter "Ulrich") is a Certified Public Accountant and presently is a citizen of the State of South Dakota.

2. Defendant St. Paul Ramsey Hospital is a hospital located at 640 Jackson Street, St. Paul, Minnesota that participated in the federal Medicare program and the Minnesota Medical Assistance program.

3. Defendant Hennepin County Medical Center is a hospital located at 701 Park Avenue South, Minneapolis, Minnesota that participated in the federal Medicare program and the Minnesota Medical Assistance program.

4. Defendant St. Luke's Hospital is a hospital located at 915 East First Street, Duluth, Minnesota that participated in the federal Medicare program and the Minnesota Medical Assistance program.

5. Defendant St. Joseph's Medical Center is a hospital located at 523 North Third Street, Brainerd, Minnesota that participated in the federal Medicare program and the Minnesota Medical Assistance program.

6. Defendant University of Minnesota Hospital and Clinics is a hospital located at 420 Delaware Street S.E., Minneapolis, Minnesota that participated in the federal Medicare program and the Minnesota Medical Assistance program.

7. The above-identified defendants are collectively referred to herein as "Defendant Hospitals".

8. None of the Defendant Hospitals are incorporated in or have principal places of business in the State of South Dakota. All of the Defendant Hospitals are doing business in Minnesota. Jurisdiction is premised on diversity of citizenship under 28 U.S.C. § 1332. Pursuant to Rule 20(a) of the Federal Rules of Civil Procedure, Defendant Hospitals are joined in this matter, as this suit asserts against all of them, claims to relief that arise out of the same series of events and transactions and questions of law and/or fact which are common to all Defendant Hospitals. The value of the claims here joined, and all of them individually, exceed fifty thousand dollars ($50,000.00), exclusive of interest and costs.

NATURE OF THE ACTION

9. The Defendant Hospitals each received windfall payments, as reimbursement of Medicare deductible and coinsurance amounts totaling approximately $2,054,068 in 1995, which had been wrongfully left unpaid by Medicare and Medical Assistance. These windfall payments were the direct

result of arduous work, over a period of six and one half years by Ulrich. Ulrich seeks legal restitution from Defendant Hospitals for the amount by which they have been unjustly enriched by his professional services.

FACTS

10. Ulrich is a certified public accountant who has served health care providers for nearly 30 years. In this capacity, Ulrich has had extensive experience in preparing cost reports and as a reimbursement consultant for the health care industry. Ulrich has a broad background as an auditor, financial advisor, Medicare and Medicaid cost report preparer, and reimbursement consultant for the health care industry, dating back to the advent of the Medicare program in 1966. Ulrich has also handled Medicare and Medicaid appeals and has successfully directed litigation on reimbursement controversies in federal and state courts.

11. In 1988, Ulrich became suspicious that hospitals participating in Minnesota's Medicare program might not have been reimbursed for outpatient treatment rendered to indigent patients eligible for health insurance coverage under both the Medicaid and Medicare health insurance programs. Hospitals who treated these so-called "dual eligible" patients were entitled to be reimbursed by the State of Minnesota for the patients' Medicare deductible and coinsurance obligations for hospital outpatient services from January 1, 1984 through June 30, 1990.

12. To confirm his suspicions, Ulrich spent months of professional time and expended other resources researching Medicare and Medicaid law, regulations, health insurance manuals and case law, along with other documents. Through his efforts, Ulrich established that his suspicions were correct -- the State of Minnesota had failed to reimburse hospitals for

Medicare deductible and coinsurance for indigent, dual eligible hospital outpatients.

13. Upon confirming his suspicions, Ulrich recognized that he would have to forego all other aspects of his public accounting work and devote himself full time to the task of obtaining such reimbursement for the shortchanged hospitals. In view of the extraordinarily complicated and convoluted nature of the matter, he also knew that he would have to sacrifice substantial resources of time and money, in order to have any chance of succeeding with his project. He also did so with the knowledge that he would acquire unique and commercially valuable information and with the intention and expectation that he would be able to market and sell his expertise to eligible hospitals, including the Defendant Hospitals. This expectation was reasonable and well-founded because Ulrich knew that it would be virtually impossible for eligible hospitals to acquire the information needed to successfully pursue their claims. He also knew that it was customary for hospitals to hire third parties like him for the purpose of recovering similar reimbursement claims from health insurers, both public and private.

14. At no time did Ulrich act or intend to act as a volunteer or intermeddler, but rather he always expected to be compensated for the development of unique and commercially valuable information, and for his efforts to use that knowledge to actually obtain reimbursement for hospitals. He also had the reasonable expectation that he would be compensated by hospitals for those efforts because at all times relevant it has been, and continues to be, a normal and customary practice in the health care industry to compensate reimbursement consultants like Ulrich.

15. In 1989, after determining that all hospitals involved had been denied proper reimbursement, Ulrich contacted all institutions in Minnesota, including the Defendant Hospitals, and offered to enter into contingent fee contracts with them

whereby he agreed to pursue their claims for reimbursement, assuming all the risk, without cost to the hospital, other than his contingent fee which was payable only if and when he was successful in obtaining additional reimbursement for them.

16. After considering Ulrich's proposal, more than fifty (50) hospitals retained Ulrich to represent them. These included some of the most substantial hospitals and hospital organizations in Minnesota. However, none of the Defendant Hospitals retained Ulrich.

17. Pursuant to his consulting agreements with the hospitals retaining him, Ulrich hired legal counsel to represent those hospitals, at his own expense and with the expectation that he would receive reimbursement for the attorneys' fees only if he recovered reimbursement for the hospitals. As a result of the huge risk, uncertain outcome and enormous commitment of time and costs involved in the undertaking, Ulrich was not able to hire legal counsel to represent the hospitals throughout the proceedings on a contingent fee basis. Instead, he was ultimately obliged to hire a lawyer on an hourly fee basis.

18. In early October of 1993, after informal efforts to persuade state and federal agencies to make the proper payments for dual eligible outpatients proved fruitless, Ulrich commenced litigation on behalf of his fifty-two participating hospitals. The litigation, brought concurrently in state and federal court and entitled *Ada Hospital, et al. v. State of Minnesota, et al.* (hereinafter *Ada Hospital*), sought to collect reimbursement of the Medicare deductible and coinsurance for dual eligible patients for the time period of January 1, 1984 through June 30, 1990.

19. Within a matter of months after the commencement of *Ada Hospital*, the Minnesota Department of Human Services agreed to pay $4,182,000 to the hospitals participating in that lawsuit, in return for the release of their claims.

20. In May of 1994, the *Ada Hospital* plaintiffs received the State's payment. Ulrich received fees from those hospitals and, out of his share of the proceeds, covered all costs (including attorney's fees) incurred in the *Ada Hospital* lawsuits.

21. In May of 1995, Ulrich approached representatives of both of the Minnesota hospital associations (then known as MHC and MHA) to enlist their assistance in communicating the success of the *Ada Hospital* litigation to the Defendant Hospitals. These associations prepared a memo to communicate this information to the Defendant Hospitals, a copy of which is attached as Exhibit A. However, before the memo was issued, the Minnesota Medical Assistance program offered to pay the Defendant Hospitals a portion of their unpaid Medicare deductible and coinsurance claims, having been prompted by Ulrich's stated intention to litigate further to achieve additional reimbursement of unpaid Medicare deductible and coinsurance for Defendant Hospitals.

22. The State's offer was presented in a letter to the Defendant Hospitals of June 2, 1995, a copy of which is attached as Exhibit B. In its letter, the State conceded that its offer to pay was directly caused by the *Ada Hospital* lawsuits.

23. Even though each one of the defendants had earlier rejected Ulrich's offer to help them recover the Medicare deductible and coinsurance for dual eligible outpatients, and while each of the defendants could have rejected the state's reimbursement offer, each one of them accepted the windfall payment from the State--but without paying or offering to pay Ulrich for the fair value of the benefit that his efforts conferred upon them.

24. As a direct result, the defendants have been unjustly enriched at Ulrich's expense. In aggregate, the Defendant Hospitals shared in a payment by the State of approximately $2,054,068 under its 1995 settlement offers.

25. Throughout this process, Ulrich never acted with gratuitous intent. Instead, Ulrich was always motivated by the prospect that **all** hospitals benefiting from his professional efforts would pay him a contingent fee to obtain reimbursement of the Medicare deductible and coinsurance amounts. This expectation was based on the unique and valuable knowledge that he acquired and on the health care industry's custom and practice of paying for such services.

STATEMENT OF CLAIM

26. Ulrich's professional efforts in *Ada Hospital* were the direct cause of the State's June 2, 1995 settlement offer and resulting payment of approximately $2,054,068 to the Defendant Hospitals in compromise of the hospitals' claims for the underpayment of the Medicare deductible and coinsurance amounts for services rendered from October 1, 1988 through June 30, 1990.

27. The settlement offers made by Minnesota Medical Assistance represented payment over and above any other previous reimbursement received by the Defendant Hospitals. It resulted from the precise formula for computing damages negotiated by Ulrich with Minnesota in the Ada Hospital case.

28. The Defendant Hospitals have all been enriched by the State's 1995 payments, which would not have been made to them absent the years of professional services rendered by Ulrich.

30. It is unjust to allow the defendants to retain the benefits conferred upon them by Ulrich without paying for the reasonable value of the benefit conferred by Ulrich's services to them.

31. Defendant Hospitals have a legal duty to pay Ulrich for his services, even though he had no express contract with any of them.

32. Defendant Hospitals have not paid Ulrich for his professional services.

33. Defendant Hospitals have been unjustly enriched by Ulrich in an amount equal to the benefit conferred on them as a result of Ulrich's efforts.

WHEREFORE, Plaintiff Charles D. Ulrich demands judgment as follows:

a. Damages, measured in *quantum meruit* for an amount greatly in excess of $50,000, and

b. For such other and further relief as this Court may deem just and equitable.

DEMAND FOR JURY TRIAL

The plaintiff hereby demands trial by jury, on all issues.

Dated: February 16, 1996.

MOSS & BARNETT
A Professional Association

By /s/
Thomas J. Shroyer #100638
Cory Larsen Bettenga #220656
Attorneys for Plaintiff
4800 Norwest Center
90 South Seventh Street
Minneapolis, MN 55402-4129
Telephone: (612) 347-0300

MHC Memorandum

DATE: May 19, 1995

TO: Hospital CEOs

FROM: David Doth, MHC
David Lee, MHA

RE: Contact with C.D. Ulrich, CPA

Recently, I was approached by Chuck Ulrich, CPA about hospital industry interest in a Medicare/Medicaid reimbursement project. This memorandum gives you a short sketch of Ulrich's activity.

The project turns on Ulrich's belief that during the period 1984 to 1990 the state Medicaid agency erroneously interpreted federal regulations and consequently underpaid hospital providers for outpatient services delivered to Medicaid recipients. The state error involved improper treatment of deductible and coinsurance amounts for dual eligible recipients.

Over the last six years Ulrich has worked with 52 Minnesota hospitals and litigated the matter in both state and federal court. These earlier actions resulted in a settlement between the hospitals and state and federal governments. The settlement amount to the hospitals was in excess of $4 million.

Mr. Ulrich believes that other hospitals, not party to the original settlement, continue to have substantial amounts at issue and cause for a claim. The claim would likely involve

additional litigation. Ulrich typically works on a contingent fee basis with no fees paid by the hospital.

This is not a project of MHC or MHA; however, you may have an interest in this issue and in further exploring the potential for you organization. If so, Mr. Ulrich can be contacted at the address below.

Chuck Ulrich
1712 Arthur's Count
Aberdeen, So. Dakota 57401

Phone (605)-229-2271
Fax (605)-229-6893

EXHIBIT A TO COMPLAINT AND DEMAND FOR JURY TRIAL

State of Minnesota
Department of Human Services
Human Services Building
444 Lafayette Road
St. Paul, Minnesota 55155

June 2,1995

Attention Hospital Administrator:

Re: Proposed settlement involving Medicare crossover payments to outpatient hospitals that participated in the Minnesota Medical Assistance program from October 1, 1988 through July 1, 1990

We are writing to you regarding a proposed settlement of claims for coinsurance and deductibles associated with Medicare crossover payments for the period running from October 1, 1988 through July 1, 1990. As an offer of settlement to resolve potentially outstanding claims, this communication is governed by Rule 408 of the Federal Rules of Evidence and should therefore not be construed as an admission regarding any of the matters discussed.

In April 1994, the Minnesota Department of Human Services ("DHS") with the Federal Health Care Financing Administration ("HCFA"), settled a lawsuit related to Medicare crossover payments to a number of outpatient hospitals that participated in the Minnesota Medical Assistance ("MA") program (*Ada Municipal Hospital, et al. v. Natalie Haas Steffen, et al.*, Ct. No. Civil 4-93-972). In researching the claims in that lawsuit, DHS discovered that these hospitals may, in fact, not have been paid in full accordance with Minnesota's revised Medicaid State Plan from October 1, 1988

through July 1, 1990. Based on that discovery, a settlement was proposed by DHS and HCFA and the case with the 52 plaintiff hospitals was resolved.

Although not a condition of the settlement, DHS has gone on to consider making a similar offer to the remaining hospitals which participated in the MA program during October 1, 1988 through July 1, 1990. It is DHS's intent to now resolve any potential outstanding claims for the remaining MA hospitals so that it can conclude this matter in an equitable manner. (By extending this offer, however, DHS does not intend to waive any defenses DHS may have against assertion of claims by any party that chooses not to accept the offer.)

The methodology used in calculating the potentially outstanding claims for the remaining hospitals is identical to the process used in the settlement of the *Ada Hospital* case. That payment methodology is attached. Using this methodology would result in a payment to your facility of $

Please review the attached Settlement Agreement, if it is acceptable to you, please sign it and return it to DHS, Attention: Larry Woods, 444 Lafayette Road, St. Paul, Minnesota 55155-3849. If you have any questions about the agreement, please call Kim Buechel Mesun, Assistant Attorney General at (612) 296-8406.

Because of the approaching fiscal year end, we request that you return the signed Settlement Agreement to Mr. Woods by June 23, 1995. The payment your hospital is to receive will then be reflected as a positive gross adjustment in the next warrant cycle.

Thank you for your attention to this matter.

Sincerely,

HELEN M. YATES
Assistant Commissioner
Health Care Administration
(612) 297-3374

Enclosures

cc: Kim Buechel Mesun
Larry Woods

EXHIBIT B TO COMPLAINT AND DEMAND FOR JURY TRIAL